(29,871)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 561

ROBERT F. MITCHELL, GEORGE H. MITCHELL, CO-PARTNERS, TRADING AS R. F. AND G. H. MITCHELL, APPELLANTS,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1923

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. A-246

ROBERT F. MITCHELL, GEORGE H. MITCHELL, Co-partners, Trading as R. F. and G. H. Mitchell,

vs.

THE UNITED STATES

I. PETITION AND AMENDED PETITION

On August 12, 1921, the plaintiffs filed their original petition.

Subsequently, to wit, on March 31, 1923, by leave of court, the plaintiffs filed an amended petition. Said amended petition is as follows:

AMENDED PETITION—Filed March 31, 1923

To the honorable the judges of the Court of Claims:

The petition of Robert F. Mitchell and Geo. H. Mitchell, co-partners, trading as R. F. and G. H. Mitchell, respectfully shows to the Honorable Court:

I. That in the year 1917 your petitioners were the owners of a tract of land of 440 acres known as "Shandy Hall" situated five and one-half miles below the town of Aberdeen, in Bush River Neck, Harford County, Maryland.

II. That at the same time your petitioners owned and operated a canning business on the said tract of land that had been established by their father about the year 1895. The main factory was a [fol. 2] building 100 feet by 66 with all proper outbuildings necessary for their business. It was equipped with the latest improved sanitary machinery with a daily output of between two and three thousand cases (2 dozen cans) per day. Their business was packing and selling the highest grade of sugar corn, known to the trade as "Whole Grain Shoe Peg Corn." Your petitioners planted each year for canning about two hundred acres of their own land and had by their diligence and industry developed customers among the neighboring farmers who planted for their use from six to seven hundred acres additional.

The "Whole Grain Shoe Peg Corn" is the highest grade of corn packed, and not only is Harford County the pioneer in this business, but Bush River Neck grew three-fourths of the pack of this grade of corn produced in the country.

These lands in Bush River Neck are particularly adapted to the successful growing of this grade of corn, due apparently to the peculiar character of the soil and climatic conditions arising from its location, the bay, river and creek surrounding them.

The profitable growing of this corn for canners requires also special training and experience on the part of the farmer. Special cultivation of the land and careful selection and testing of seed are required. The planting must be at stated intervals and an understanding co-operation must exist between the grower of the corn and the canner. Such co-operation had been secured with the farmers in the neighborhood only after years of painstaking work on the part of your petitioner.

"Shandy Hall" and the canning factory were situated in the center of this canning district with water facilities for shipping.

The operation of such a business requires skilled and trained labor, and an adequate supply of such labor residing in the immediate neighborhood had been developed after years of operation and development of the canning business.

[fol. 3] Your petitioners have through years of industry and intelligent business management built up a high-grade market for their special product.

The average net income from the business conducted by your petitioners for the five years prior to 1917 was about $10,000 per year.

III. That the urgent deficiencies appropriation act passed on the 6th day of October, 1917 (40 Stat. Chap. 79, p. 345, at p. 352, etc.), by the 65th Congress of the United States provided in part as follows:

"Proving Ground.—For increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose, and also the salaries and expenses of any agents appointed to assist in the procurement of said land or damages resulting from its taking, $7,000,000: Provided, That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the Presi-
[fol. 4] dent and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property by the President as aforesaid the title to all such property so taken over shall immediately vest in the

United States: Provided further, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder."

IV. That on October 16th, 1917, pursuant to said Act of Congress the President of the United States issued a proclamation (40 Stat., Part 2, p. 1707) declaring the lands and canning factory of your petitioners together with land of the said neighboring farmers furnishing corn for your petitioners' business and lands of others more remote, in all about 35,000 acres, to be "necessary for the purpose of the appropriation." In the event that the lands described in the proclamation could not be secured by purchase on or before October 20th, 1917, the President therein ordered that possession and title to any of the said land might

"be taken on behalf of the United States by the Secretary of War or his duly accredited representative or representatives for use for the purposes referred to in said act of Congress, subject to the provisions of said act as to compensation to be paid therefor. All owners of land and improvements, possession of which will be taken under authority of said act of Congress and by virtue of this proclamation, may appear before a commission to be appoined by the Secretary of War and present their claims for compensation for consideration by said commission and ultimate determination by the president in accordance with the provisions of said act of Congress."

[fol. 5] V. That on the 14th day of December, 1917, pursuant to the above act of Congress referred to, the President of the United States issued a second proclamation (40 Stat., Part 2, p. 1731) wherein he declared that the tract of land therein described was "necessary for the purposes specified in said appropriation." The said tract therein described was largely the same as described in the Proclamation of October 16th, 1917, and covered the lands and factory of your petitioners and the farmers heretofore referred to as producing corn for your petitioners' business.

The proclamation further provided:

"It having been ascertained that the said lands and appurtenances and improvements attached thereto can not be procured by purchase, I do hereby take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, for use and for the purposes specified in said act of Congress, of and to all lands included within the metes and bounds above described, subject to the provisions of said act as to compensation to be paid therefor, and do hereby require that all persons now residing thereon shall vacate the same by January 1, 1918. All owners of land and improvements, title and possession of which are hereby taken under authority of said act of Congress, and all persons having claims or liens in respect thereto are hereby notified to appear before the commission appointed by the Secretary of War at their office in Aberdeen, Maryland, and present their claims for compensation for consideration by said commission

and ultimate determination by the President in accordance with the provisions of the said act of Congress.

This proclamation supersedes the proclamation issued on the 15th day of October, 1917, authorizing the Secretary of War to take over the lands above described together with other lands, which prior proc-
[fol. 6] lamation, in so far as it is inconsistent with this proclamation, is hereby revoked."

VI. The Government took possession of the whole tract of land as described in the said Proclamation of December 14th, 1917, and your petitioners and all other said farmers engaged in raising corn for use of your petitioners, and your petitioners and the said farmers were compelled to abandon their homes, their farms and their business and to move to other parts. The said farmers were scattered and either took up farming in diverse parts of the county or were compelled to go into other lines of work. As a result of the taking the land required for the proving ground, your petitioners' business was destroyed through the loss of their farm, factory and their location peculiarly suited to this business, the dispersement of the farmers who had been trained by years of diligent instruction in the planting, cultivation and harvesting the corn, the dispersement of the skilled and competent labor, and the loss of the market and trade through inability to supply the high-grade goods called for by their trade.

Your petitioners have made diligent effort to re-establish themselves in business. They have searched in vain for a locality in which to resume business. They have been unable to find any suitable location that had either or both the soil or climatic conditions, the availability to transportation or a location where the farmers were able or willing to co-operate with your petitioners or where labor conditions were such that the outlay or expenditure necessary to begin business again would be justified and, in fact, no such locality is to be found. Harford County, Maryland, is an old community, residents living there from generation to generation and it was through your petitioners' family traditions and reputation in the immediate neighborhood that they were able to develop and advance their business interests.

[fol. 7] Harford County is the seat of the canning industry in Maryland. Canning industries have been established for many years in all of the various localities therein that were capable of supporting such industries. This fact has also militated against your petitioners securing a location for their business without getting into ruinous competition with other canning industries already established.

Your petitioners' business has been destroyed and instead of an income of about $10,000 per year, their operations in the canning business have shown a loss since 1917.

The value of the business and good will so destroyed was $100,000.

VII. And your petitioners further allege and charge that when the defendant, the United States, through its said representative, took possession of your petitioners' land and at the same time de-

stroyed your petitioners' said business as hereinbefore set forth, and your petitioners assented to the taking of their said land and said business in pursuance of the acts of Congress hereinbefore referred to, wherein it was provided not only that your petitioners should be paid for their land, but paid all damages resulting from the taking thereof, the said defendant became and was obligated to pay and promised to pay your petitioners a reasonable sum in compensation for the damages done to them by the taking of their said business aforesaid, as well as for the value of their land.

VIII. In accordance with the last above-mentioned proclamation, a commission of three members, known as the Government Proving Ground Commission, was duly appointed by the Secretary of War. Your petitioners presented their claims for the land and canning house taken by the Government by the said last mentioned proclamation and presented to the commission their claim for losses, damages and injuries resulting in the destruction of their canning business.

[fol. 8] Your petitioners were awarded and paid the sum of $76,000 for the value of the land and plant only, the commission stating that they had no authority to either take into consideration the value of the business in awarding compensation, or to pay for the destruction of their business.

Your petitioners have never received any compensation for the destruction of their business as a result of the taking over of the said lands for the proving ground at Aberdeen.

IX. No assignment or transfer of this claim has been made. Your petitioners have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government.

Wherefore your petitioners pray judgment for $100,000, with interest.

R. F. & G. H. Mitchell, By Horace S. Whitman, Atty. Horace S. Whitman, Attorney of Record. William L. Marbury, Robt. Archer, Robt. H. Archer, Jr., Of Counsel.

Jurat showing the foregoing was duly sworn to by H. S. Whitman; omitted in printing.

[fol. 9] II. General Traverse

No demurrer, plea, answer, counterclaim, setoff, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission of Case

On May 16, 1923, this case was argued and submitted on merits by Messrs. Horace S. Whitman and William L. Marbury, for the plaintiffs, and by Mr. M. L. Blake, for the defendant.

[fol. 10] IV. **Findings of Fact, Conclusion of Law and Opinion by Booth, J., and Addendum**—Entered June 4, 1923

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I. The plaintiffs are brothers, and are residents and citizens of the State of Maryland.

On October 16, 1917, and for many years prior thereto, plaintiffs were the owners and operators of a farm of about 440 acres in Harford County, Maryland, some 5 miles from the town of Aberdeen, Maryland, and of a canning plant on said farm, for canning corn.

Plaintiffs' growing and canning operations were practically confined to the growing and canning of a choice variety of corn, for the production of which corn the land and climate in that vicinity were especially adapted and much better suited than other lands in that section of the country. The usual acreage of corn used by plaintiffs in their canning operations was about 500 acres, of which about 200 acres were usually grown by them on their said farm, the remainder being grown under contract with plaintiffs by neighboring farmers.

II. By act of October 6, 1917, 40 Stat. 345, 352, Congress made an appropriation for the establishment of an ordnance proving ground, and provided for the acquisition of and payment for the land necessary for such purpose. Pursuant to the provisions of said act, the President, on October 16, 1917, issued a proclamation, 40 Stat., 1707, declaring certain lands in Harford County, Maryland, comprising about 35,000 acres, and including the plaintiffs' said farm, to be necessary for the purpose in question. And on December 14, 1917, in consequence of the Government's inability to secure by negotiation the purchase the lands designated in said proclamation of October 16, 1917, the President issued a proclamation specifically taking over said lands by the Government, for the purpose stated.

[fol. 11] III. In September, 1917, just prior to the passage of the said appropriation act authorizing the establishment of said proving ground, an officer of the War Department visited Harford County, Maryland, and at one or more public meetings held in the locality where the proving ground was to be located, stated that the Ordnance Department had recommended to Congress that in the establishment of the proposed proving ground the people where it might be estab-

lished should be compensated not only for the land taken by the Government for the purpose, but also for all injuries and losses sustained by them as a result of its establishment there, and that this principle of compensation would govern in the event that the proving ground should be established there.

IV. Both before and shortly after the passage of the act of October 6, 1917, providing for the establishment of the proving ground, a number of citizens whose property and business would be affected by its being located there near Aberdeen, called on the Secretary of War in the matter and were assured by him that compensation for property taken and for losses sustained by reason of the establishment of the proving ground would be made on the most liberal basis that the law would allow and justice to the Government permit.

V. Following the taking of said lands by the Government, a commission was appointed by the President for the determination of the proper compensation to be paid to those to whom compensation was due for and on account of the taking of said lands.

Said commission found the amount of compensation which plaintiffs were entitled to receive on account of the taking of their said farm and canning plant to be $76,000; and pursuant to this finding by the commission, plaintiffs were paid by the Government the said sum of $76,000, plaintiffs accepting same without protest or rejection.

In the determination of the amount of the compensation to be paid to the plaintiffs on account of the taking of their said property, said commission did not make any allowance for damage for plaintiffs' loss of the business in which they were engaged prior to and at the time of the taking of said property.

VI. Plaintiffs' whole training and experience had been in the growing and canning of "whole-grain Shoe Peg corn." By the establishment of said proving ground on the lands so taken by the Government a very large part of the lands in that section of country available for and especially adapted to the growing of Shoe Peg corn was withdrawn from use for that purpose, and plaintiffs were thereafter unable to reestablish themselves in their former business of growing and canning this kind of corn.

[fol. 12] VII. During the five years next preceding the taking of plaintiffs' said property by the Government the average annual net income of plaintiffs from the said property and business was approximately $6,000.

On the basis of a 6 per cent income on the $76,000 received by plaintiffs from the Government for their said property, plaintiffs would have received an annual income of $4,560 from the compensation received from the Government for said property. Plaintiffs have been engaged in other occupations since the said taking of their property, but it does not appear what have been their net earnings or incomes during this time.

VIII. It does not satisfactorily appear whether or not plaintiffs have, upon the whole, sustained any reduction or loss in net income or any other loss by reason of the Government's taking their said property and the discontinuance of their said business of the growing and canning of corn.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover and their petition should be and the same is hereby dismissed. Judgment is rendered against the plaintiffs in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Booth, Judge, delivered the opinion of the court.

The plaintiff firm was the owner of 440 acres of land upon which a canning plant was located in Harford County, Maryland. The business of the firm consisted in raising whole-grain Shoe Peg corn on about 200 acres of its own land, and then canning said product, as well as such quantities of corn as it procured from outside parties, for the market. The capacity of the plant was sufficient to absorb as a general proposition the yield of corn from about 500 acres of land. This locality was especially suited for the production of Shoe Peg corn, the soil and climate seemingly favorable to its cultivation and growth, and the members of the copartnership had spent years in developing the industry, expanding the market for the corn, thus giving it a well-established public favor and market value.

On October 6, 1917, 40 Stat. 352, Congress passed the following act:

"Proving Ground.—For increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose, and also the salaries and expenses of any agents appointed to assist in the procurement of said land or damages resulting from its [fol. 13] taking, $7,000,000: Provided, That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the persons entitled to

receive the same, such persons shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property by the President as aforesaid the title to all such property so taken over shall immediately vest in the United States: Provided further, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder."

On October 16, 1917, the President issued a proclamation, 40 Stat. 1707, by the terms of which certain lands in Harford County, Maryland, comprising about 35,000 acres, were taken over for the establishment of what is known as the Aberdeen Proving Grounds. Plaintiffs' land and canning plant were within this area and were taken over. The taking over of such a vast area of land was a matter of grave local concern, especially to the owners thereof. The President, in order to arrive at just compensation to all the persons whose property had been thus taken, appointed a commission to go upon the land, hear testimony, and otherwise acquaint themselves with what would, in their estimation, amount to just compensation in each individual's case.

The commission so appointed made its report with reference to the property here involved, and the President fixed just compensation to the owners at $76,000. This amount the plaintiff accepted. Suit is now brought for the sum of $100,000 additional, based upon the destruction and extinction of the firm's business, aside from its loss of physical property. It is asserted that a cause of action exists because the acts of the defendant not only destroyed the business of the plaintiff by taking its farm and canning plant, but by taking all the lands adjoining, peculiarly adapted to the production of Shoe Peg corn, and the only place so adapted, it has made it impossible for the plaintiff to acquire a similar business anywhere else. In other words, its entire business enterprise is wholly and completely annihilated forever by the destruction of the plant and the source of its supply.

There are apparently two insurmountable obstacles to a recovery in this case. First, the President was authorized under the statute to fix just compensation, and if the amount so fixed was unsatis- [fol. 14] factory to the party, he might accept 75 per cent of the award and sue for such further sum as added thereto would amount to just compensation. The plaintiff accepted the award. The statute having pointed out a definite way, and the party having observed the same without availing itself of the privileges of reserving the right to a further demand, may not accept its benefits and then seek to discredit the same. If the award did not meet the full measure of just compensation, the plaintiff should have taken advantage of

the very liberal terms of partial settlement and asserted its claim for the alleged balance. It may not under the law do both.

Even without this defense the suit must fail. The question at issue has been determined by the Supreme Court in the case of Bothwell v. United States, 254 U. S. 231. The plaintiff contends for a loss of $100,000. The sum so claimed is alleged to be the losses it sustained from being foreclosed from conducting its business enterprise, coupled with the complete extinction of its source of supply. An argument is advanced that because of the taking over of this large acreage of adjoining farm lands peculiarly adapted to raising Shoe Peg corn the plaintiff was unable to reestablish its canning industry anywhere in the United States.

The record shows that the average annual profit realized from the industry was $6,000. The defendant allowed and the plaintiff received $76,000 in cash. Allowing a return of 6 per cent on the sum so received, the plaintiff still has an income from the taking of its capital investment of $4,560 per annum, which amount, with addition of the individual earning capacity of the members of the firm, will not, in view of past history, fall much, if any, short of the annual dividends received from the industry as a going concern. So it would be difficult, even if the asserted contention were tenable, to predicate a judgment for the amount claimed upon any other than a mere speculative theory. Obviously, to do so would involve the assumption of a continuance of contemporaneous conditions, full crops, business stability, etc.

The petition is dismissed. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

ADDENDUM

On Monday, June 4, 1923, we handed down an opinion in this case dismissing the petition. The court without division was of the opinion that under the statute the plaintiff might not accept the full amount of the award of the President and thereafter sue for such further sum as added thereto will amount to just compensation. On the same day the Supreme Court decided the case of the Houston Coal Co. v. United States, and entertaining some doubt as to whether this feature of the instant case was not concluded by this decision, we decided to withhold our opinion in this case. If it were not for the decision in the Houston Coal Co. case we would adhere to our former views. The issue in the Houston Coal Co. case arose under a different statute, and while the wording is the same, the court seems to have given effect to protest, duress, and an express reservation of the plaintiff to demand more, a state of facts absent from this case. The question in the Houston Coal Co. case [fol. 15] was one of jurisdiction. This case is here on the merits, and because of the apparent difference as to protest, notice of reservation, and intention to sue, as well as duress, we are somewhat doubtful as to the scope of the decision in the Houston Coal Co. case when applied to the present record. The vast number of cases

involving large sums of money heretofore paid, as was done in this case, manifestly caused us to hesitate to apply the rule announced beyond the strict limitations appearing in the opinion. This will be added to the former opinion.

[fol. 16] V. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Fourth day of June, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration find in favor of the defendant, and do order, adjudge and decree that the plaintiffs, as aforesaid, are not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same is hereby dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiffs, as aforesaid, the sum of Two hundred and eighty-three dollars and forty-five cents ($283.45) for printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VI. PLAINTIFFS' APPLICATION FOR APPEAL AND ORDER ALLOWING APPEAL—Filed Aug. 14 and 17, 1923

Now comes the plaintiff- by their Attorney and applies for the allowance of an appeal to the Supreme Court of the United States from the Judgment of this Honorable Court of June 4th, 1923, dismissing the petition herein.

Respectfully submitted, Horace S. Whitman, Attorney for Plaintiff-.

[File endorsement omitted.]

Ordered: That the above appeal be allowed as prayed for.

George E. Downey, Judge U. S. Court of Claims.

[File endorsement omitted.]

[fol. 17] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the find-

ings of fact, conclusion of law and opinion of the court by Booth, J., and addendum; of the judgment of the court; of the plaintiffs' application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City, this Twelfth day of September, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 29,871. Court of Claims. Term No. 561. Robert F. Mitchell, George H. Mitchell, co-partners, trading as R. F. and G. H. Mitchell, appellants, vs. The United States. Filed September 20th, 1923. File No. 29,871.

NO. 176. OCTOBER TERM, 1924.

IN THE

Supreme Court of the United States

ROBERT F. MITCHELL, GEORGE H. MITCHELL, CO-PARTNERS, TRADING AS R. F. AND G. H. MITCHELL, APPELLANTS,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

HORACE S. WHITMAN,
Attorney for Appellants.

WILLIAM L. MARBURY,
ROBERT H. ARCHER,
ROBERT H. ARCHER, Jr.,
Of Counsel.

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NO. 176.

OCTOBER TERM, 1924.

IN THE

Supreme Court of the United States

ROBERT F. MITCHELL, GEORGE H. MITCHELL, CO-PARTNERS, TRADING AS R. F. AND G. H. MITCHELL, APPELLANTS,
VS.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement of Case.

I. THE NATURE OF THE CASE.

This case comes up on appeal from the Court of Claims. The case, presented in barest outline, is one in which the United States Government, desiring to acquire a Proving Ground for the successful prosecution of the War against Germany, exercised its power of condemnation over certain lands in Harford County, Maryland, including the 440-acre farm of the appellants. On this farm had been erected a canning plant; and somewhat less than one-half of the acreage was used to grow a choice brand of canning corn. A commission appointed

for the purpose, awarded $76,000 as compensation for the loss of the land and canning factory. This was paid.

The commission *expressly refused* to award compensation for the destruction of the appellants' canning *business,* notwithstanding the fact that under the circumstances it was physically impossible to re-establish this business elsewhere.

Accordingly, after fruitless efforts to re-establish themselves, the appellants brought this suit in the Court of Claims, seeking compensation for the destruction of their business and for this only. From the action of that Court in denying their claim, this appeal is taken.

II. THE FACTS.

In stating the facts, we shall limit ourselves to the express findings of the Court below and necessary inferences therefrom. Certain explanatory details, which will be found in the opinion of that Court, will be placed in parentheses.

On October 16, 1917, and for many years before that date, the appellants, brothers and residents of the State of Maryland, were partners and owners of a 440-acre farm lying in Harford County, Maryland, near by the town of Aberdeen. Their land (because of the quality of the soil in that locality) and the climate, was peculiarly fitted for the growth of a choice variety of corn, known as "Whole-grain Shoe Peg Corn."

Accordingly, the appellants had employed 200 of their acres in the cultivation of this choice brand of corn.

They had placed on their land a canning factory in which they packed the products of their land and the lands of neighboring farmers, for whose crops they had made contracts. The combined acreage on which they drew annually came to approximately 500 acres, all in the immediate vicinity.

(The members of the co-partnership had spent years in developing the industry, expanding the market for the corn, thus giving it a well-established public favor and market value). In the five years preceding the autumn of 1917, the appellants derived from the business an annual net income of approximately $6,000. (This income was derived from the industry alone, for the purpose of which less than one-half of the farm was utilized).

On the 6th day of October, 1917, Congress passed an Act containing the following provision (to be found in 40 Stat. at L. 345, 352):

> "Proving Ground: For increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and *losses* to persons, firms and corporations, resulting from the procurement of the land for this purpose, and also the salaries and expenses of any agents appointed to assist in the procurement of said land or damages resulting from its taking, $7,000,000; Provided, That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and

other rights, appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said *land* and *appurtenances and improvements* shall be taken over as aforesaid, the United States shall make just compensation therefor to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory, to the persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property by the President as aforesaid the title to all such property so taken over shall immediately vest in the United States; Provided further, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder."

Just prior to the passage of the Act from which we have quoted, an officer of the War Department visited Harford County, and, at public meetings in the locality in which the Proving Ground was later located, stated that the Ordnance Department had recommended to Congress, that in the establishment of the proposed Proving Ground, the people in the location, where it might be established, should be compensated, not only for the land taken by the Government for this purpose, but also for all injuries and losses sustained by them as a result of its establishment there; he further stated that this principle of compensation would govern if the Proving Ground were established in that locality.

Both before and after the passage of the Act, a number of citizens, whose property would have been effected by the establishment of the ground near Aberdeen, called on the Secretary of War and were assured by him that compensation for property taken and losses sustained would be given, as far as the law and justice to the Government permitted.

Proceeding under this Act, the President on October 16, 1917, issued a Proclamation (40 Stat. at L., Part 2, p. 1707), declaring the lands and canning factory of the appellants, together with the land of neighboring farmers, in all about 35,000 acres, to be "necessary for the purposes of the appropriation." And on December 14, 1917, the President issued a Proclamation (40 Stat. at L., Part 2, p. 1731), specifically taking over these grounds for the purposes stated.

By this exercise of the power of eminent domain, the appellants were deprived of all the physical property which they had owned in that locality. Furthermore (because of the peculiar character of their business, and the impossibility of duplicating elsewhere the excellent conditions of which they had had the benefit), they found themselves utterly unable to re-establish their canning business. The Proving Ground occupied a very large part of the lands in that section of the country, which were especially adapted to the growing of Shoe Peg corn. (In other words, its entire business was wholly annihilated forever by the destruction of the plant and the source of its supply).

After the lands had been taken, the President appointed a commission to determine the amount of compensation to be paid. It was decided that the appellants should be paid $76,000 for the taking of their property. In making this allowance, the commission did not include anything for the destruction of the appellants' business, by the taking of the property *and that of his neighbors.* The amount recommended by the commission was awarded by the President and accepted by the appellants.

Since the time, when the property was taken in this fashion, the appellants have been engaged in other occupations. It does not appear what their net incomes have been during this time, but it does appear that their whole training and experience had been in the growing and canning of Shoe Peg corn.

Such is the case made out by the Findings of the Court of Claims. In addition, there appears the following statement:

> "VIII. It does not satisfactorily appear, whether or not plaintiffs have, upon the whole, sustained any reduction or loss in net income or any other loss by reason of the Government's taking their said property and the discontinuance of their said business of the growing and canning of corn."

This may be meant to embody the conclusion of the lower Court on the whole case; in which event it is not binding on this Court on appeal, but merely a general conclusion of law. Cf. *United States v. Pugh*, 99 U. S.

265; *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 502, 503. If, however, it is meant as a finding, expressing a general conclusion of *fact*, then it is the contention of the appellants that it is directly contradictory to the specific findings that preceded it, and, in consequence, cannot be taken as an established fact on this appeal.

THE ARGUMENT.

We present to this Court a threefold argument. We seek to show that there is nothing in the Act of Congress, under which compensation was awarded, to prevent the appellants from pressing this claim.

Again we contend that the general finding of the Court of Claims, to the effect that the appellants have not shown any loss for which they have not been compensated, is inconsistent with the *specific* findings of fact already made by that Court, and is in direct contradiction of the necessary inferences to be drawn from these *specific* findings.

Finally, we contend that on the *specific* findings made by the Court, excluding the eighth finding which is general, a case is presented which entitles the appellants to compensation beyond that which they have received. To establish this, we advance three propositions:

I. The acceptance of the full amount awarded by the President does not prevent the appellants from pressing this claim.

II. The eighth finding, which is general, is inconsistent with the other *specific* findings of the Court

and, in consequence, there do not remain sufficient uncontradicted findings on which to base a judgment.

III. Excluding the eighth (general) finding from consideration, on the other *specific* findings of the Court, a case is presented, which entitles the appellants to the compensation which they claim.

(a) By virtue of an implied contract arising out of the taking under the Fifth Amendment;

(b) By virtue of the Act of Congress under which the property of the appellants was taken.

I.

THE ACCEPTANCE OF THE FULL AMOUNT AWARDED BY THE PRESIDENT DOES NOT PREVENT THE APPELLANTS FROM PRESSING THIS CLAIM.

The President awarded $76,000 for the taking of the appellants' land and canning factory. The full amount was accepted by the appellants.

The statute provides that:

> "If the amount thereof [of compensation] so determined by the President, is unsatisfactory to the persons entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty and section one hundred and forty-five of the Judicial Code."

On this the Court of Claims at first was of the opinion that the appellants were precluded from bringing this suit. In an addendum to their opinion as a result of the

decision of this Court in the case of *Houston Coal Company v. United States*, 262 U. S. 355, they appear to have withdrawn this ground of decision. Nevertheless, we deem it proper to discuss the point briefly.

It may be that the acceptance of the full amount of the award by the appellants precludes them from attacking the valuation placed upon their *land* and *canning plant* by the commission. It is possible that they cannot urge that they have not been properly paid for the value of the physical property.

Nor will the appellants attempt to do so. They are entirely satisfied with the amount fixed by the commission as the value of this property and maintain that its propriety cannot now be questioned.

What they are asking is compensation for *another* and distinct item of loss, namely, the complete destruction of a profitable *business*. The annihilation of this business was a loss to them, quite apart from the mere loss of physical property, a part of which was utilized for the purposes of the business.

It cannot be too insistently pointed out that the commission in making its award ignored and intentionally ignored the destruction of this asset.

They were concerned with the physical value of the property taken and regarded the destruction of the *business* as an entirely separate matter, with which they had no concern. It was perhaps because of their distinct

feeling that this was a separate piece of property entirely, that they refused to allow any compensation for its destruction.

It must also be emphasized that the appellants' business was not destroyed by the mere taking of the physical plant. It was the taking of this plant *together with the rest of the appellants' lands and of the neighboring lands available for the purpose of this business* that resulted in the permanent extinction of the business. This property was not only entirely distinct from that for which the appellants were compensated, but it was taken by the Government *in a wholly different manner.* The action of the Government, on which the appellants relied to support their claim for the destruction of the business, contained elements which did not effect the mere taking of the appellants' land.

It is, therefore, submitted that the very points upon which the reasoning of the Court below is hung, to wit, that the appellants failed to show the course prescribed by the statute must be rejected as not founded in fact. *There was no course prescribed by the statute, which would apply to the claim of the appellants for the destruction of their BUSINESS.* The course prescribed was applicable only to an entirely different state of facts. The appellants have, therefore, not been derelict in failing to follow it.

Even if there shall be doubts in the minds of the Court as to the soundness of the propositions, which have seemed to us so plain, yet we submit, that, proceeding

upon the assumption that we have failed to show that the statute was not applicable, the whole question nevertheless has been disposed of in the *Houston case, supra.*

In that case a controversy arose over a provision of the Lever Act (40 Stat. at L. 276), which was worded in a manner identical with the Act which is in issue in our case. And the plaintiff had accepted the full amount awarded by the President, notwithstanding which, he instituted suit in the District Court as provided in the Lever Act, for additional compensation. The jurisdiction of the District Court was challenged. It was upheld by this Court through Mr. Justice McReynolds, who said:

> "The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequential hardships. * * *
>
> It reasonably may be assumed that Congress intended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners."

It is true that the question in that case was one of jurisdiction, but it is not perceived that the application of the case is in any way affected thereby. The point made by the Court of Claims, seems to us to be clearly a question of jurisdiction also.

It is also true that in that case there was protest, duress and a reservation of the right to demand more. It does not appear, however, in what way these facts are essential to the result reached.

If the acceptance of three-fourths of the award is the only means, which the statute leaves open to the injured party, then the fact that he makes a protest or express reservation of right to demand more, or feels obliged to do so because of pressure brought to bear on him, cannot help him.

We, therefore, respectfully submit, that our failure to accept only a portion of the award does not disqualify us from bringing this suit, first, *because we were not required to do so by the provisions of any law;* second, because if we were so required, the decisions of this Court have made it plain that failure to comply with this requirement does not bar further action to obtain just compensation.

II.

THE EIGHTH FINDING, WHICH IS GENERAL, IS INCONSISTENT WITH THE OTHER SPECIFIC FINDINGS OF THE COURT AND IN CONSEQUENCE THERE DO NOT REMAIN SUFFICIENT UNCONTRADICTED FINDINGS ON WHICH TO BASE A JUDGMENT.

Let us recapitulate some of the specific findings of fact. It was found by the Court that the tract of land belonging to the appellants, extended over 440 acres, and that of these acres, only about 200 were used in the canning business. The remaining 240 acres were free for other uses, either as a homestead or for the raising of other agri-

cultural products, or for pasture land or for any use to which the owners saw fit to put it.

To what use it was actually put does not appear, but that the land was fertile and of value is clearly apparent from the findings.

Again the lower Court found that the net income, which the appellants received from the industry alone, averaged $6,000 over a period of years immediately prior to the taking by the Government. (In making this statement, we do not go outside of the Record. It is true that the Court finds that "the average annual net income of the appellants from the said property was approximately $6,000," but this is made clear by the opinion, which says, "the record shows that the average annual profit realized from the industry was $6,000."

This statement taken in conjunction with the other findings of the Court make it absolutely certain that "the said property" is equivalent to the property, which was employed for the purposes of the industry only.)

Again, it was found that the commission in awarding compensation for the land made no allowance for the destruction of the business. In other words, in valuing the land, they were concerned with the physical properties only and did not consider its value as a part of the capital investment of the busines.

Having made these findings, the Court took the $76,000, which was allowed by the President *for the entire tract and canning factory* calculated the interest on this at 6%

and reached the conclusion that from this amount the appellants received an anuual income of $4,560.

This item they compared with the return of $6,000, *which was the annual income from the industry alone,* and reached the conclusion that the appellant had suffered no loss. This conclusion they embodied in Finding VIII. We respectfully submit that this conclusion is absolutely inconsistent with all that went before it.

The reasoning of the Court of Claims, proceeded on two assumptions, one of which was expressed, the other left inarticulate. The first is implicit in the following statement in the opinion of the Court:

> "Allowing a return of 6% on the sum so received, the plaintiff only has an income from the taking of his capital investment of $4,560 per annum, which amount with the additional earning capacity of the members of the firm, will not in view of past history, fall much, if any, short of the annual dividends received from the industry as a going concern."

It is submitted that the Court here assumed that the net return of $6,000 was calculated without making any deduction of a reasonable compensation for the time, which the appellants gave to the work. For it is plain that if the appellants received $6,000 a year over and above all operating expenses, *including a fair allowance for their time,* then that was a dead loss to them, regardless of how profitably their time is now employed.

But as there is nothing in the Record to contradict it, we must grant the accuracy of this assumption, no matter how extraordinary it may seem.

The second assumption, which must be made to reach the conclusion embodied in the eighth finding is this: That the 240 acres, which were not employed in the industry, were utterly worthless. *For unless the* $6,000 *income constituted the entire return from the whole tract by the Government, then it is obviously inaccurate and unfair to compare that amount with the lump sum which the Government paid for the whole tract.*

In other words, $4,560 per annum represents all that the appellants can now receive in place of the emoluments which they derived from the entire property, including the 240 acres, which were not used in the canning business. The Court has by direct inference found that $6,000 was *the entire return from the whole property,* but as they found that this amount was received from *the canning industry alone,* the clear assumption is that the remainder of the property is valueless.

It is submitted that this assumption is not founded in fact. Consider to what it leads.

It has been expressly found by the Court, that the President, in awarding compensation, made no allowance for the business. If no allowance is made for the business, then we are forced to the conclusion that the President allowed $76,000 for the 200 acres, which were planted in corn, and for the canning factory; and for these alone.

It is to be assumed, of course, that nothing was paid for the 240 acres, which we have decided to be worthless.

To admit that allowance had been made for worthless acres, would be to attack the valuation made by the President as excessive; the which this Court may not do, except on clear evidence. *Shoemaker v. United States*, 147 U. S. 282, 306.

Now, if no allowance was made for the business and no allowance for the worthless acres, then the only item considered was the value of the 200 acres and the factory. *These alone must have been worth the full amount paid.*

But if the property employed in the business was so valuable, that a 6% return on a fair value of it, equals the total income from the entire business (which is, of course, the eighth finding of the lower Court), then it is obvious that the business itself was valueless. The going value, working capital, good will and all the other elements that generally enhance the value of a business, failed to do so in this case, for we have found that a portion of the physical property employed, when fairly valued, was alone worth enough to earn at 6% a *return equal to that actually received from the whole business.*

Further, since the return from the business represents the return from the whole tract, we reach the final proposition, that a 6% return from the fair valuation of the canning factory and less than one half of the farm, equals, if it does not exceed, the total return, which appellants received from the whole tract.

Thus we see, that when to the eighth finding of the lower court, the scalpel has been applied and its sinews laid bare, that finding can be reconciled with the specific findings preceding it, only by assuming the following facts:

1. That in calculating a net profit of $6,000 a year no deduction was made for the appellants' time.

2. That 240 acres of a tract lying in a locality, which by soil and climate is particularly fitted to the growth of a choice variety of corn, are absolutely worthless.

3. That a business in which had been the appellants whole training and experience, and to the development of which they had spent years—expanding the market for its product and giving it a well established favor and market value—is worthless.

4. That a 6% return on a fair valuation of a canning plant and 200 acres of the same tract, so large a part of which is worthless, equals, if it does not exceed, the entire return, which the appellants (whose earning capacity is held in high respect by the Court), were able to obtain from the whole tract and the business put together.

It is suggested that these assumptions demand a little too much. Rather, when once they are disclosed as the premises on which the reasoning of the Court is based, that reasoning is refuted.

We therefore submit that the Court of Claims in making their calculations, inadvertently omitted from their

consideration, certain very import elements of value; that this omission led them into some conclusions, which were inconsistent with the findings, which they had specifically made; and that it was on these conclusions that they relied in denying the claim of the appellants.

If we have demonstrated that the eighth finding which was general and the result predicated on that finding, are inconsistent with prior specific findings, then either of two courses may be pursued. This Court may disregard the finding as a general conclusion, the error in which is apparent on its face.

cf. *Wilson v. Merchants Loan, etc., Co.*, 183 U. S. 121, 128, and cases cited.

Or they may prefer to reverse the case and remand to the Court of Claims in order to straighten out the tangle, since there do not remain in the Record enough uncontradicted facts to support the judgment of the Court below.

See

Barnes v. Williams, 11 Wheaton, 415, 416.
United States v. Berdan Firearms Company, 156 U. S. 552, 573.
Hathaway & Co. v. United States, 249 U. S. 460.

III.

EXCLUDING THE EIGHTH (GENERAL) FINDING FROM CONSIDERATION, ON THE OTHER SPECIFIC FINDINGS OF THE COURT, A CASE IS PRESENTED, WHICH ENTITLES THE APPELLANTS TO THE COMPENSATION WHICH THEY CLAIM.

(a) BY VIRTUE OF AN IMPLIED CONTRACT ARISING OUT OF THE TAKING UNDER THE FIFTH AMENDMENT.

We hardly need rehearse the premises on which the argument under this section is based, namely, that where property is taken by the United States Government, a contract to pay compensation therefore, will be implied, thus, giving the Court of Claims jurisdiction to entertain suits for such amount as shall constitute that just compensation. This has been considered settled since *United States v. Lynah*, 188 U. S. 445, 464; *Campbell v. United States*, Sup. Ct. Adv. Repts., Dec. 8, 1924, No. 73. By this means the guarantees of the Fifth Amendment are made realities.

With that in view, we quote from the case of *Monongahela Navigation Company v. United States*, 148 U. S. 312, in which case Congress provided for the taking over of a lock and dam together with appurtenances of the Monongahela Navigation Company, and had further provided:

> "That in estimating the sum to be paid by the United States, the franchise of the said corporation to collect shall not be considered or estimated."

Mr. Justice BREWER at page 325 said:

> "The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire

amendment is a series of negations, denials of right or power in the government, the last, the one in point here being, 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of these two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out and the 'just compensation' is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."

The Court then quotes from the case of *Montgomery County v. Bridge Company*, 110 Penn, St. 54, 58, in which the condemnation of a bridge belonging to the bridge company was sought, as follows:

"The Bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness. If they yield no money in return over expenditures, they would possess little, if any, present value. If, however, they yield a revenue over and above expenses they possess a present value, the amount of which depends, in a measure, upon the excess of revenue. Hence it is manifest that the income from the bridge was a necessary and proper subject to inquiry before the jury."

And at page 337, Mr. Justice Brewer says:

"Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post-office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that fran-

> chise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation."

It is entirely apparent that throughout the above quotation the word "business" could be substituted for the words "franchise or charter" where the business is such a business that it can not be re-established elsewhere, and that no change in the effect of that language would be required. The only real question presented, is that in the *Monongahela case*, this Court has said that where a franchise is taken or destroyed by the Government it is property within the meaning of the Fifth Amendment and that there must be just compensation for the taking. Whereas, in the case at bar, although from the undisputed facts there is a complete taking by the Government, yet the taking which is now being contended for is taking of a business upon which question this Court has never passed.

This Court has, however, passed upon the following species of property and has held that they must be compensated for:

Land: *Hulings v. K. Valley Co.* 130 U. S. 559.
Easements: *U. S. v. Gross,* 243 U. S. 316, 328, and *U. S. v. Welch,* 217 U. S. 33.
Charters and Franchises: *Monongahela Navigation Co. v. U. S.,* supra.

Contracts: *New Orleans Gas. Co. v. Louisiana Light Co.*, 115 U. S. 650, and *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685.

Fishing Rights: *Holyoke Co. v. Lyman*, 15 Wall, 500.

There can be no doubt after reading the record in the case at bar that there was a complete and effectual taking of the petitioners' business when the Government took over their farm and the surrounding territory, because in this particular case the business attached to the farm and the surrounding acreage and not to the personality or industry of the owners thereof. It was something fixed—immovable in fact. Something which would flourish only under the conditions existing in Harford County. The surrounding farmers planting regularly for a particular canner, the climate, land necessary for the whole-grain shoe-peg corn business, contributed to this industry and were all essential to this industry, and there is no other place in which all these essential elements may be found, and therefore *no other place in which this business may be re-established.*

In the cases of *U. S. v. Gross*, supra; *U. S. v. Lynah*, 188 U. S. 445, and *Pompelly v. Green Bay Co.*, 13 Wall. 166, where water was dammed up so that it overflowed the plaintiffs' land, this was held to constitute a taking. In the case of *Peabody v. U. S.*, 231 U. S. 530, it was held by way of dictum that:

> "If the Government had installed its battery, not simply as a means of defence in war, but with the

purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made."

A similar case to the Peabody case is *Portsmouth Harbor Land & Hotel Co. v. United States*, 251 U. S. 1. See also *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327.

And further, it is entirely immaterial for what use or purpose the property is taken, thus even though the property is destroyed, yet it is a taking for which compensation must be made.

Grant's Case, 1 Court of Claims, 41.
Wiggin's Case, 3 Court of Claims, 412.
Gill's Case, 10 Court of Claims, 89.

In the case of *United States v. Grizzard*, 219 U. S. 180, Mr. Justice LURTON in delivering the opinion of the Court, at page 184, said:

"The constitutional limitation upon the power of eminent domain possessed by the United States is that 'private property shall not be taken for public use without just compensation.' The 'just compensation' thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plain-

tiffs' farm has depreciated the usefulness and value of the remainder the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into account both the benefits which accrue and the depreciation which results to the remainder in its use and value."

And at page 185 the learned Justice further said:

"That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was fifteen hundred dollars, when the value of the entire place before the taking was three thousand dollars. A judgment for a less sum will not be that 'just compensation' to which the defendants are entitled. The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice."

If, as Mr. Justice LURTON said, it would be a travesty upon justice to pay a man only for a narrow strip of land actually appropriated and leaving out of consideration the depreciation to the remaining land, *all the more would it be a travesty upon justice in the case at bar to take and pay for the petitioners' land and physical plant and leave out of consideration entirely the fact that their*

business had been completely and totally destroyed by the very act of taking their land and physical plant, together with the surrounding county. That is so, because in most cases a business may be removed. It is in a sense personal. But in the present case, as has been said above, that is not true, and the reason which prompts the text writers to lay down the general rule that business is not property within the meaning of the Fifth Amendment is entirely absent in this case, inasmuch as such writers base their whole theory upon the fact that the business can be removed and ignore such anomalies as is presented in the present case, where a removal is a *physical impossibility.*

An established business or good-will has been held to be property in many other branches of the law, among them, for example, business has been regarded as a proper subject matter for sale or bequest. *Howard v. Taylor,* 90 Ala. 241; *Canhane v. Jones,* 2 Ves. & B. 218. It has been held to be an asset of a partnership. *Cooke v. Collingridge,* 27 Beav. 456. And an asset available in the hands of a trustee in bankruptcy. 46 & 47 *Victoria,* Chapter 42, Sec. 56.

This Court in the case of *Truax v. Corrigan,* 257 U. S. 312, 327, held in the strongest manner possible, that a business was property and as such was protected by the "due process clause" of the Fourteenth Amendment. It seems to us that this decision makes the proposition for which we contend a practical certainty.

The point which it is desired to make here is that the case at bar is a very exceptional case, and that the reason for the so-called general rule, that business is not property in case of eminent domain, is absent here inasmuch as there is no speculation as to the value of the business or what portion of it has been taken, etc. The business has a readily ascertainable value, and it has been *completely and totally* and forever destroyed, and hence no speculation is necessary. Not only would this view seem to be the proper one upon principles of justice and the theory of the law, but the following cases lend it support:

In the case of *Commissioner of Parks v. Moesta,* 91 Mich. 149, Judge Montgomery in delivering the opinion of the Court said:

> "The constitutional provision entitling the owner of private property taken for public use, to just compensation, has uniformly been construed to require full and adequate compensation. The rules to be applied in fixing the compensation are not necessarily the same as obtain in fixing damages in actions upon contracts. The correct rule of compensation in such cases is more nearly analogous to the remedy afforded in an action in tort in which property rights have been interfered with without the owner's assent. *In such cases damages for the interruption of the owner's business are allowed. Allison vs. Chanler,* 11 Mich. 549.
>
> In Massachusetts, where, in actions upon contracts, damages for the interruption of business are not usually allowed, for the rule is otherwise in condemnation proceedings. In the case of *Patterson vs. Boston,* 23 Pick. 425, it was held that an instruction to the jury might, among other items of damage,

allow the owner for the loss of earnings and profits in his business while it was necessarily suspended, was proper."

The Court then quoted from the opinion of Judge Campbell in the case of *G. R. & I. R. R. Co. v. Weidus*, 70 Mich. 390, 395, as follows:

> "Both appellants were using their property in lucrative business, in which the locality and its surroundings had some bearing on its value. Apart from the money value of the property itself they are entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. *There may be cases where the loss of a particular location may destroy business altogether, for want of access to any other location that is suitable. Whatever damage is suffered must be compensated.* Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses."

The Michigan Constitution says (Art. 18, Section 2): "When private property is taken for the use of benefit of the public, the necessity for using such property and the just compensation to be made therefor * * * shall be determined by a jury."

Section 21. The jury "to determine and award to each person entitled thereto the proper compensation to be allowed for his or her interests in the land so taken."

In the case of *State v. Chapman*, 69 N. J. L. 464, 466, Judge Fort by way of dictum, said:

"A calling, business or profession, chosen and followed, is property. *Bare vs. Essex Trades Council*, 8 Dick. Ch. Rep. 101, 112; *Slaughter House Cases*, 16 Wall. 36, 116.

The legislature can no more destroy a business by statute, without providing for compensation, than it can authorize a corporation to take a piece of real estate for public use, except upon compensation."

In the matter of *Euclid Avenue*, 8 Ohio S. & C. P. 86, it was held that where a business street is changed to a pleasure drive compensation should be made for injury to the business of the property owners. And in *Foust v. Pa. R. R.*, 212 Pa. 213, that where a land owner has been compelled to close his business by reason of the construction of additional tracks by a railroad, thereby rendering it dangerous for customers to visit his place of business, he may recover damages.

And in *Chicago, S. F. & C. Ry. v. McGrew*, 104 Mo. 282, it was held that in estimating the value of land taken by the railroad, the fact that there was coal under it should be taken into consideration and if the business of the owner as a miner is interrupted by reason of the appropriation of part of the land, compensation should be allowed for the reasonable future value of the use of the mine during the period of such necessary interruption. See also *St. Louis V. & T. H. R. R. Co. v. Capps*, 67 Ill. 607; 72 Ill. 188; *Florida, etc., Ry. Co. v. Brown*, 23 Fla. 104; *Philbrook v. Berlin Shelburne Power Co.*, 75 N. H. 599.

It is therefore respectfully submitted that not only upon principle, but upon the authorities cited with the reference to exceptional cases of eminent domain, that irrespective of the Act of Congress of October 6, 1917, establishing a Proving Ground, the petitioners are entitled to recover just compensation not only for their farm and cannery, but also for their business.

(b) BY VIRTUE OF THE ACT OF CONGRESS UNDER WHICH THE PROPERTY OF THE APPELLANTS WAS TAKEN.

The words of the Act of Congress passed October 6, 1917, make it clear beyond a shadow of doubt that Congress, irrespective of the Fifth Amendment, intended that there should be just compensation for losses to business incurred by the taking over of the land necessary for the Proving Ground. The Act of Congress referred to has been set out in full above, but the words that are important with regard to the present contention are as follows:

> "For increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, *land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose.*" (Italics ours.)

With ordinary principles of construction clearly in mind, it at once becomes apparent that Congress felt that perhaps the word "damages" had a fixed and fundamental meaning, namely, to include only the land and tangible effects, taken, but that Congress further felt that there would be unduly heavy and crushing *losses* sustained by those whose business was completely

destroyed by the taking of the land, together with its appurtenances, and that therefore the Congress used the words *"land and damages and losses to persons, firms, and corporations"* in order to compensate justly, not only those whose land and tangible effects had been taken, but also those whose business had been destroyed. What other possible construction can be given for the insertion of that word? It cannot be assumed that the word "losses" was inserted through inadvertence or to reinforce the word "damages" for the latter word speaks well for itself and needs no buttressing, and if in such cases a liberal construction is to be placed upon the words of the statute and every word is to be given a meaning, it will not do to say that the word "losses" means nothing. Moreover, the intent or design of words may be gathered not merely from the language of the enactment, but also from the causes or necessity which prompted its passage and from foreign circumstances.

Durousseau, 6 Cranch, 307; *Johnson v. Heald*, 33 Md. 352.

What were the facts? Did not an officer of the War Department state before the passage of the Act of October 6, 1917, that business as well as land and tangible property would be compensated for? Congress was not ignorant of these statements, and in fact it knew the general situation and provided for it so that that particular community would not have to bear an unjust proportion of the cost of the war against Germany by the use of the word "losses."

And furthermore it is of importance to compare this language with that of an Act of Congress (22 Stat. at L., 168 c. 294), which was construed in *U. S. v. Alexander*, 148 U. S. 186, and in *U. S. v. Truesdell*, 148 U. S. 196. In those cases Congress authorized a survey to be made and land condemned for the construction of an aqueduct for the water supply of Washington, D. C. It thus provided: "Any person or corporation having any estate or interest in any of the lands embraced in said survey and map who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered thereof, and *any person who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be construed, shall be directly injured in any property right*, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims of the United States setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained, etc."

The plaintiff's land was not taken, nor was it within the survey, but his well was drained by the construction of the aqueduct.

The Court at page 190, said:

> "It is contended, on behalf of the United States, that the legislature intended to restrict the right to sue exclusively to the parties holding *land within the limits of the survey*, and that hence the Court of Claims erred in recognizing the claim for damage to lands not embraced in the survey. We are unable to adopt this view of the meaning of the statute.

"On the contrary, we think the plain meaning and intent of the legislature were to provide for the case of those whose lands or property rights were directly injured by the construction of the work proposed to be done, as well as for the case of those injured by the taking of their lands. This seems to us so clear as to require no elucidation. This very point, arising under the act in question, was decided by this court in Great *Falls Manufacturing Co. v. The Attorney General*, 124 U. S., 581, 596, where it was said: 'While Congress supposed that a survey and map could be made with such accuracy as to embrace all the land necessary, under any circumstances, for the purposes indicated in the act of 1882, and while provision is made whereby the owners of lands, covered by such survey and map, can obtain just compensation, the act also opens the Court of Claims to every person who, by the construction of the works in question, has been injured in any property rights, provided that, within a given time, suh person file his petition in that court, setting forth his right or title and the amount claimed by him as damages.'"

Let us compare first the words of the statutes in the two cases. In the Alexander case it provides:—"And any person who, by reason of the taking of said land, or by the construction of the said works hereinafter directed to be constructed, shall be directly injured in any property right, may, etc." And in the case at bar the appropriation is for "land and damages and losses to persons, firms and corporations, resulting from the procurement of the land for this purpose." There can be no question that this is a loss to a firm resulting from the procurement of the land, nor is there any difference in meaning between "any person, who by reason of the taking, etc., shall be directly injured in any property right," and "for losses to firms resulting from the procurement of land,

etc." If any difference exists, the latter is the broader language, and hence includes more.

The Act in the case at bar sets forth how the money shall be expended, namely:—"Provided, That if the land and appurtenance and improvements attached thereto, *as contemplated under the foregoing appropriation,*" etc., and "That if said land and appurtenances and improvements shall be taken over as aforesaid the U. S. shall make just compensation therefor," etc. The phrase "as contemplated under the foregoing appropriation" clearly refers back to the purposes for which the appropriation was made and the term "just compensation" can only be satisfied by paying to each person entitled, the value of his losses as set forth in the purposes of the appropriation and this includes by its very words, "losses to firms resulting from the procurement of land."

CONCLUSION.

We respectfully submit, therefore, that we have shown our right to bring this action; further that we have shown that the *general* conclusion of the Court of Claims expressed in the eighth finding to the effect that the appellants suffered no loss from the destruction of their business is inconsistent with other *specific* findings made by that Court and that this reason alone furnishes a ground for the reversal of this cause.

Finally, we submit that we have established that a case has been made out on the *specific* findings by the Court of Claims, on which the appellants are entitled to compensation on two separate and distinct grounds.

1. That their packing business, that is to say the business of packing the special brand of whole grain Shoe Peg corn, having been destroyed entirely, an implied contract arises by which the Government is required to make just compensation within the meaning of the Fifth Amendment to the Constitution of the United States, *which compensation includes an amount sufficient to cover the value of this business.*

2. That even though the Court should not be of the opinion that the appellants are entitled to recover the value of the business by virtue of the implied contract arising from the taking under the Fifth Amendment, they are entitled to recover by virtue of the provisions of the Proving Ground Act, which provided for compensation for not only the land and damages, but also *"losses"* resulting to persons, partnerships, etc., from the taking of the lands.

Respectfully submitted,

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Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1924

ROBERT F. MITCHELL, GEORGE H. MITCHELL, Copartnership, Trading as R. F. and G. H. Mitchell, appellants
v.
THE UNITED STATES

No. 176

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims dismissing the petition of plaintiffs-appellants upon findings of fact made after trial of the issues.

The United States acquired from claimants 440 acres of farm land with improvements thereon, paying therefor the sum of $76,000. This land is now part of the Aberdeen Ordnance Proving Grounds, Maryland, embracing about 35,000 acres. The proving grounds were established under the Act of October 6, 1917, c. 79, 40 Stat. 345, 352.

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Some time after accepting unconditionally the $76,000 as compensation for the physical properties claimants brought this action to recover $100,000 damages for the destruction of its canning business, carried on for many years prior to 1917 in connection with the farm which has been secured by the Government, as already described.

THE FACTS

The following facts have been determined by the Court of Claims:

On October 16, 1917, and long prior thereto, the claimants were the owners of a farm near Aberdeen, Harford County, Maryland, embracing about 440 acres. Located thereon was a canning plant operated by claimants for canning corn. This business consisted in growing and canning a particular grade of choice corn known as "Whole Grain Shoe Peg Corn."

This farm and other lands in that vicinity, as well as the climatical conditions, were especially adapted for the raising of this kind of corn.

The claimants used on an average of about 500 acres of corn in their canning operations and 200 acres thereof were used by them for growing this corn, the remainder being grown under contract with neighboring farmers. (First Finding, p. 6.)

The Deficiency Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 352, contained the following provision:

> PROVING GROUND: For increasing facilities for the proof and test of ordnance ma-

terial, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose, and also the salaries and expenses of any agents appointed to assist in the procurement of said land or damages resulting from its taking, $7,000,000: *Provided*, That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property

by the President as aforesaid the title to all such property so taken over shall immediately vest in the United States: *Provided further*, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder.

The President, by proclamation of October 16, 1917 (40 Stat. 1707), declared certain lands in Harford County, Maryland, embracing about 35,000 acres, to be necessary for the proving grounds. The farm of about 440 acres and improvements thereon owned at that time by claimants were included in that area.

The Government having been unable to secure by negotiation the purchase of the lands, the President, on December 14, 1917 (40 Stat. 1731), issued a proclamation taking over the lands designated in the proclamation of October 16, 1917, for the purposes noted. (Second Finding, p. 6.)

In September, 1917, prior to the passage of the act, an officer of the War Department visited Harford County, Maryland, and at one or more public meetings, held in the vicinity of the proving grounds, stated that the Ordnance Department had recommended to Congress that persons from whom land was obtained therefor should be compensated, not only for the land taken, but also for all injuries and losses sustained by them as a result of the establishment there of the proving grounds, and that this principle of compensation would govern in the event the Government project should be established there. (Finding 3, pp. 6–7.)

A number of citizens, whose property and business would be affected by this project, called on the Secretary of War both before and after the passage of the Act of October 6, 1917, the latter assuring them that compensation for property taken and for losses sustained by reason thereof would be made on the most liberal basis that the law would allow and justice to the Government permit. (Fourth Finding, p. 7.)

Following the taking of the lands, the President appointed a commission to determine the proper compensation to be paid to those whose lands were taken.

The commission determined that claimants were entitled to $76,000 for their farm and canning plant, and pursuant to this finding, that sum was paid by the Government to claimants, who accepted the same "without protest or rejection."

In arriving at the amount of compensation to be paid for these properties, the commission did not make any allowance for damage for claimants' loss of the business in which they were engaged prior to and at the time of the taking. (Fifth Finding, p. 7.)

Claimants' whole training and experience had been in the growing and canning of "Whole Grain Shoe Peg Corn." By the establishment of the proving grounds a very large part of the lands in that section of the country available for and especially adapted to the growing of "Shoe Peg Corn" was withdrawn from use for that purpose, and claimants were there-

after unable to reestablish themselves in their former business of growing and canning this kind of corn. (Sixth Finding, p. 7.)

During the five years next preceding the taking of claimants' property, their average annual net income from the property and business was approximately $6,000.

On the basis of six per cent income on $76,000 paid claimants for their property, they would have received an annual income of $4,560. Claimants have been engaged in other occupations since the taking, but it does not appear what have been their net earnings or incomes during this time. (Seventh Finding, p. 7.)

It does not satisfactorily appear whether or not claimants have, upon the whole, sustained any reduction or loss in net income or any other loss by reason of the taking of their property by the Government and the discontinuance of their business of the growing and canning of corn. (Eighth Finding, p. 8.)

The Court of Claims in dismissing the petition, rested its decision on two grounds. First, that the plaintiff, in accepting unconditionally the $76,000 fixed by the President as just compensation, precluded a recovery of any further sum for damages arising out of the taking of the land. Secondly, that the Government is not liable for damages due to the loss of claimants' business.

In a supplementary opinion, the Court of Claims further decided that the decision of this Court in *Houston Coal Company* v. *United States*, 262 U. S. 361, relative to the right of a claimant to recover further compensation under a statute worded similarly to that of the Act of October 6, 1917, *supra*, did not in any way conflict with its decision upon that point in the instant case, for the reason that there was no protest, notice of reservation, or intention signified to sue after the acceptance by the claimants of the award of $76,000, at the time it was paid to them by the Government.

THE QUESTIONS INVOLVED

1. Whether the claimants by accepting unconditionally the award of $76,000 are not thereby precluded from recovering any further sums as compensation for damages arising out of the taking of their land.

2. Whether the loss of a business, resulting from the taking of land by the Government, constitutes an element of damage for which United States must pay.

3. Whether Congress intended in using the phrase "damages and losses to persons, firms, and corporations, resulting from the procurement of land," in the Act of October 6, 1917, to give the right to recover damages which did not previously exist, and which are not legal damages within the meaning of "just compensation."

ARGUMENT

I

When the United States paid and the claimants unconditionally accepted the amount fixed by the President as just compensation for the property taken, the question of damages arising out of the original transaction became settled as an accord and satisfaction

The United States by Presidential Proclamations of October 16, 1917, and December 14, 1917, took possession and title to the lands now embraced within the proving grounds.

In order to determine just compensation to be paid the various owners of the property, the President, through the Secretary of War, appointed a commission. By the Proclamation of December 14, 1917 (40 Stat. 1731, 1733), all interested persons were notified to appear and present their claims for compensation to that Board. The commission then submitted tentative awards to the President. The latter then, pursuant to the terms of the Act mentioned, in each case, fixed the amount of just compensation to be paid. He fixed the amount of just compensation in this case at $76,000, and tendered the sum to claimants in settlement of their claim. They voluntarily accepted it without reservation or protest—unconditionally.

In the light of these facts it is apparent that all parties concerned intended that acceptance of the award of $76,000 should be a complete settlement of the claim of the appellants against the United

States for taking this property. It became a closed transaction. It was equivalent to a purchase by the United States at an agreed price. When the President, through his representatives, offered the claimants the sum of $76,000 and they accepted and received it without indicating that it was unsatisfactory, the transaction was the same as any other offer and acceptance. If the claimants did not so intend, it is reasonable to assume that they would have done something to preserve any rights which they believed they might have by indicating that the amount offered was unsatisfactory. The statute itself gave them a remedy if the offer was not satisfactory, and in the absence of any indication on their part that it was not satisfactory the acceptance must be regarded as conclusive evidence that it was satisfactory. In other words, the transaction amounted to a voluntary settlement.

The case of *Houston Coal Company* v. *United States*, 262 U. S. 361, is not an authority to the contrary. In that case, brought under section 10 of the Lever Act (Act of August 10, 1917, c. 53, 40 Stat. 276), the plaintiff alleged that in accepting the price fixed by the President as just compensation for coal requisitioned the amount fixed was received under protest because of duress, and with express reservation of the right to demand more.

The District Court dismissed the petition for lack of jurisdiction, holding that the Act in question did not grant permission to sue the United States to

one who had received the amount determined by the President.

The case was brought to this Court by direct writ of error and involved merely the jurisdiction of the District Court to hear and determine the issues presented. In reversing the District Court and holding that that court had such jurisdiction, this Court, by Mr. Justice McReynolds, said (p. 365):

> Considering this purpose and the attending circumstances, we think section 10 should be so construed as to give the District Courts jurisdiction of those controversies which arise directly out of requisitions authorized by that section.

Nothing in that opinion can be construed as an authority to the effect that one who unconditionally and without protest or reservation accepted the amount tendered by the President had a right to recover by suit any further sum as compensation.

By unconditionally accepting the $76,000 from the United States, all matters arising out of the taking of the land presented by claimants and considered by the commission and the President have become voluntarily settled and the transaction is now foreclosed, which the statute plainly intended it should be in such cases. *N. Y., N. H. & H. R. R.* v. *United States*, 251 U. S. 123, 127; *Winslow* v. *Baltimore & Ohio R. R.*, 208 U. S. 59, 62; *St. Louis Hay Co.* v. *United States*, 191 U. S. 159; *Pacific R. R.* v. *United States*, 158 U. S. 118, 121, 122; *United States* v. *Garlingle*, 169 U. S. 316, 322; *Chicago, Milwaukee Ry.*

Co. v. *Clark*, 178 U. S. 353; *DeArnold* v. *United States*, 151 U. S. 483; *United States* v. *Child & Co.*, 12 Wall. 232; *Baker* v. *Nachtrieb*, 19 How. 126; *Macfarland* v. *Poulos*, 32 App. D. C. 558.

This rule of law has been followed by the Court of Claims since 1873: *Comstock* v. *United States*, 9 C. Cls. 141; *Hancox* v. *United States*, 8 C. Cls. 400, 401; *Martin* v. *United States*, 10 C. Cls. 176, 282; *Baldwin* v. *United States*, 16 C. Cls. 297, 304; *Henegan* v. *United States*, 17 C. Cls. 273, 285; *Belt* v. *United States*, 23 C. Cls. 317, 319; *White* v. *United States*, 28 C. Cls. 57, 64; *Brice* v. *United States*, 32 C. Cls. 23, 29; *St. Louis Hay & Grain Co.* v. *United States*, 37 C. Cls. 281, 291 (affirmed 191 U. S. 159), and by the courts of the several States: *Allen* v. *Colorado Central R. Co.*, 22 Colo. 238; *Central of Ga. R. Co.* v. *Bibb Brick Co.*, 99 S. E. 126; *Fitzgerald* v. *Chicago Ry. Co.*, 48 Kan. 537; *Brigham* v. *Holmes*, 14 Allen (Mass.) 184; *Clay Co.* v. *Howard*, 95 Neb. 389; *Anthony* v. *Granger*, 22 R. I. 359.

II

The United States in taking the claimants' land, together with improvements, did not appropriate the business conducted thereon by this partnership, and is under no obligation to pay therefor

It is well settled that when the United States exercises its right of Eminent Domain it must pay just compensation for property taken. It is equally well settled that it includes the value of the land taken and improvements thereon, but does not include damages for loss of business.

In *Bothwell* v. *United States*, 254 U. S. 231, this court held that where the Government in the construction of a dam flooded private land, destroying the owners' hay there stored, and forced him to remove and sell his cattle, there was no obligation on the part of the United States to pay for the destruction of the business. There, the claimants' business was that of raising cattle. In this connection, Mr. Justice McReynolds, at pages 232–233, said:

> Certainly appellants' position in respect of the items in question is no better than it would have been if no condemnation proceedings had been instituted. In the circumstances supposed there might have been a recovery "for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require." *United States* v. *Cress*, 243 U. S. 316, 329. But nothing could have been recovered for destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation.

The Court of Claims upon the point now under consideration rested its decision on that case. We think that decision disposes of this case.

The fact that the business destroyed in the case at bar was that of conducting a canning factory,

whereas in the *Bothwell case* it was that of raising cattle, is immaterial. The principles involved are the same.

It has, in fact, become well settled that when land occupied for business purposes is taken by Eminent Domain, anticipated profits from the continued carrying on of the business (which in the case at bar the claimants are seeking to recover) in its established location can not be considered in estimating the damages. *Brackett* v. *Com.*, 223 Mass. 119; *Pause* v. *Atlanta*, 98 Ga. 92; *Becker* v. *Philadelphia, etc. R. Co.*, 177 Pa. St. 252; *Hamilton* v. *Pittsburgh, etc., R. Co.*, 190 Pa. St. 51; *Philadelphia Ball Club* v. *Philadelphia*, 192 Pa. St. 632; *Cox* v. *Philadelphia, etc., R. Co.*, 215 Pa. St. 506; *Hunter* v. *Chesapeake, etc., R. Co.*, 107 Va. 158; *Bales* v. *Wichita Midland Valley R. Co.*, 92 Kan. 771; *Gauley, etc., R. Co.* v. *Conley* (W. Va.), 100 S. E. 290. See also *Laflin* v. *Chicago W. & N. R. Co.*, 33 Fed. Rep. 415, 421. In this connection Lewis on Eminent Domain (3rd Ed.), Section 727 (pp. 1271–1273) says:

> While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injury to business. The reason is that the Constitution and the statutes, as ordinarily worded, require only that just compensation shall be made for the property taken. Just compensation, as we have already seen, where an entire property is taken, is the market value of the property, and where a part is taken it is the value

> of the part taken and damages to the remainder by the taking and use of the part of the purpose proposed. The business conducted upon the property is not taken and the owner can remove it to a new location or continue it upon the part of the property which remains. Any incidental loss or inconvenience in business which may result from a removal or change consequent upon the taking must be borne by the owner for the sake of the general good in which he participates.

It is submitted that the Fifth Amendment does not guarantee to an owner whose land is taken by the Government any damages for the loss of his business by reason of the appropriation. As said by this Court in *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326:

> And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in the Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the just "compensation" is to be a full equivalent for the property taken.

In *Sawyer* v. *Commonwealth*, 182 Mass. 245, it appeared that certain property was taken in the exercise of the power of eminent domain, and damages were claimed for injuries resulting to an established business said to have been caused by the loss of

patronage as the direct result of the appropriation of the property involved. In rejecting this claim, the court, in an opinion by Mr. Justice Holmes (then Chief Justice of the Supreme Judicial Court of Massachusetts), at page 247, said:

> It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a *quid pro quo*. No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other. See *Smith* v. *Boston*, 7 Cush. 254; *Stanwood* v. *Malden*, 157 Mass. 17. It seems to us that the case stands no differently when the business is destroyed by taking the land on which it was carried on, except so far as

it may have enhanced the value of the land See *New York, New Haven, & Hartford Railroad* v. *Blacker*, 178 Mass. 386, 390.

This is now a leading case on the subject. See 10 R. C. L., Section 127 (p. 145).

III

The act of October 6, 1917, provides for the payment of nothing more than just compensation for any property taken under the statute

It is to be noticed that Congress provided for the acquisition of this proving ground in a deficiency appropriation act. This is important, because it is customary for Congress in making appropriations carefully to identify the purpose for which it is made. This because officers charged with its administration must apply the fund appropriated only to the purposes therein specified. So in the present case Congress, in making the appropriation, used this language:

> PROVING GROUND: For increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose, and also the salaries and expenses of any agents appointed to assist in the procurement of said land or damages resulting from its taking, $7,000,000.

The language just quoted is nothing more than a general statement made to identify the appropriation.

But the portion of the Act which authorizes the taking of the property expressly provides that "just compensation" shall be paid to the owners. It reads:

> That if said land and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President.

Again, the term "just compensation" is used in the Act in providing for the method to be followed by owners in the event they are not satisfied with the award made by the President. In this respect the Act reads:

> * * * and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the seventy-five per centum, will make up such amount as will be just compensation therefor.

It will be observed, therefore, that after identifying the general purposes of the appropriation, Congress, in providing what shall be paid to the persons whose property is taken, has expressly said that they are to receive "just compensation" only. Indeed, if they sue for further compensation than that allowed by the President, under the express terms of the Act they can only receive "just compensation." The

term "just compensation" is used in its Constitutional sense and as construed by the courts it does not include damages for the loss of a business resulting from the taking of land.

It is interesting to note that a somewhat similar statute was interpreted by the New York Court of Claims in *Waterloo Woolen Mfg. Co.* v. *State of New York*, 118 Misc. 516. There, the statute read, in part, as follows:

> * * * for compensation for lands appropriated as provided in section 4 of said Act (ch. 147, Laws of 1903, as am'd), or damages caused by the work of improvement hereby authorized.

It was contended that in using the language just quoted the legislature had assumed liability for all damages resulting from the improvement thereby authorized. The court in disposing of this question, at page 520, says:

> I do not think the statute discloses any such intention. It is merely a provision appropriating money, which makes available the profits of the bond issue for the specified uses including such awards against the state as might be made by the Court of Claims for compensation or damages or both according to the existing principles of law properly applicable to the claims on which the awards might be made.
>
> * * * * *
>
> This statute discloses no intention to assume new and unprecedented liabilities and its distortion to include any such an intention would be unwarranted. (P. 521.)

So in the statute involved in the case at bar, Congress intended to provide for the payment of *legal* damages which come within the term "just compensation."

It is fair to say that if Congress had intended that damages should be paid for the loss of business, they would have said so in so many words, as in *Earle* v. *Commonwealth*, 180 Mass. 579. In that case the statute read:

> In case any individual or firm owning * * * an established business on land in the town of West Boylston, whether same shall be taken or not under this Act, or the heirs or personal representatives of such individual or firm, shall deem that such business is decreased in value by the carrying out of this Act, whether by loss of custom or otherwise, and unable to agree with said board as to the amount of damages to be paid for such injury, such damages shall be determined and paid in the manner hereinbefore provided.

CONCLUSION

It is submitted that the judgment of the Court of Claims should be affirmed.

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JANUARY, 1925.

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MITCHELL ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 176. Argued January 15, 1925.—Decided March 2, 1925.

1. The Act of October 6, 1917, c. 79, 40 Stat. 345, to increase facilities for testing ordnance materials, appropriated money to pay for buildings, land, etc., "and damages and losses to persons . . . resulting from the procurement of the land," and provided that, if land and improvements could not be procured by purchase, the

President was authorized to take them over, with all appurtenant rights, and the United States should make just compensation therefor, to be determined by the President; and that if the amount so determined were unsatisfactory to the person entitled, he should be paid 75% of it and be entitled to sue the United States under Jud. Code, §§ 24 and 145, to recover such further sum as added to the 75% would make up just compensation. *Held*:— That persons whose land was taken and who accepted the compensation fixed by the President, were not thereby precluded from claiming additional compensation under the Fifth Amendment, as for a taking of their business, or from claiming damages under the Act itself for the loss of the business. P. 344.

2. It is a settled rule that damages resulting from a loss or destruction of business incidental to a taking of land are not recoverable as part of the compensation for the land taken. *Id.*

3. By its reference to "losses . . . resulting from procurement of land" the above Act doubtless authorized the Secretary of War to consider losses resulting from destruction of business when procuring land by agreement, but it is not to be construed as a departure from the settled policy of Congress to limit compensation for a taking of land to interests in the land taken. P. 345.

58 Ct. Clms. 443; affirmed.

APPEAL from a judgment of the Court of Claims rejecting, after full hearing, a claim for compensation for destruction of appellants' business resulting from the taking of their land and other land in the vicinity.

Mr. Horace S. Whitman and *Mr. William L. Marbury*, with whom *Mr. Robert H. Archer* and *Mr. Robert H. Archer Jr.* were on the brief, for appellant.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Randolph S. Collins* were on the brief, for the United States.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

Pursuant to the Act of October 6, 1917, c. 79, 40 Stat. 345, 352, the President declared that the large tract of

land in Maryland now known as the Aberdeen Proving Ground was needed for that military purpose. Proclamations, October 16, 1917 and December 14, 1917, 40 Stat. 1707, 1731. The land was thereafter acquired under that Act from the several owners either by purchase or by eminent domain. Among the parcels acquired by eminent domain was one of 440 acres belonging to the plaintiffs and used by them in the business of growing and canning corn of a special grade and quality. The establishment of the proving ground resulted in withdrawing from such use the available lands especially adapted to the growing of this particular quality of corn. Plaintiffs were consequently unable to reëstablish themselves elsewhere in their former business. For their land, appurtenances and improvements, the President fixed $76,000 as just compensation. For the business, he made no allowance. The sum awarded was accepted without protest. In 1921 this suit was brought to recover $100,000 as compensation for the loss of their business. The Court of Claims, after a hearing upon the evidence, entered judgment for the defendant. 58 Ct. Clms. 443. The case is here on appeal under § 242 of the Judicial Code.

The Act appropriated $7,000,000 for "increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose." It then provided that, if the land, appurtenances and improvements could not be procured by purchase, the President was authorized to take over the immediate possession and title for the United States; that just compensation to be determined by the President should be made therefor; and that if the compensation so determined should prove unsatisfactory to the person entitled to receive it, he was to be paid seventy-five per cent. of that amount and was to be entitled to sue for whatever

further sum was required for just compensation. Plaintiffs make two contentions. The first is that, because the business was destroyed, they can recover, under the Fifth Amendment, as for a taking of the business upon a promise implied in fact, under the doctrine of *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645. The second contention is that, under the terms of the Act, they can recover damages for loss of the business although it may not have been taken. In support of each contention, they rely, among other things, upon the findings of fact that, before the passage of the Act, a representative of the War Department had given assurance publicly that compensation would be paid not only for the land taken by the Government but also for all injuries and losses sustained by any person as a result of the establishment of the proving ground; and that, both before and shortly after the passage of the Act, the Secretary of War had given somewhat similar assurances.

The mere fact that compensation for the taking of the land was fixed by the President and was accepted does not bar recovery on the present claim, whether the suit be deemed to be upon a promise implied in fact for a taking or for the recovery of statutory damages. The claim now asserted is on account of property other than that for which the Act provided that compensation should be made upon the President's determination. Acceptance of the award did not operate, under the doctrine of *United States* v. *Childs & Co.*, 12 Wall. 232, as a voluntary settlement of this claim. There are, however, other obstacles to a recovery. The Act authorized the taking only of "land and appurtenances and improvements attached thereto." And it did not declare that compensation should be made for losses resulting from the establishment of the proving ground.

The special value of land due to its adaptability for use in a particular business is an element which the owner

of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408; *New York* v. *Sage*, 239 U. S. 57, 61. Doubtless such special value of the plaintiffs' land was duly considered by the President in fixing the amount to be paid therefor. The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction. *Joslin Manufacturing Co.* v. *Providence*, 262 U. S. 668, 675. Compare *Sharp* v. *United States*, 191 U. S. 341; *Campbell* v. *United States*, 266 U. S. 368. No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land. There can be no recovery under the Tucker Act if the intention to take is lacking. *Tempel* v. *United States*, 248 U. S. 121. Moreover, the Act did not confer authority to take a business. In the absence of authority, even an intentional taking cannot support an action for compensation under the Tucker Act. *United States* v. *North American Co.*, 253 U. S. 330.

By including in the appropriation clause the words "losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose," Congress doubtless authorized the Secretary of War to take into consideration losses due to the destruction of the business, where he purchased land upon agreement with the owners. But it does not follow that, in the absence of an agreement, the plaintiffs can compel payment for such losses. To recover, they must show some statutory right conferred. States have not infrequently directed the payment of compensation in similar situations. The constitutions of some require that compensation be made for con-

sequential damages to private property resulting from public improvements. *Chicago* v. *Taylor*, 125 U. S. 161; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 554. Others have, in authorizing specific public improvements, conferred the right to such compensation.[1] *Ettor* v. *Tacoma*, 228 U. S. 148; *Joslin Manufacturing Co.* v. *Providence*, 262 U. S. 668. Congress had, of course, the power to make like provision here. Compare *United States* v. *Realty Co.*, 163 U. S. 427. But the mere reference in the appropriation clause to losses "resulting from the procurement of the land for this purpose" does not confer such a right. The settled policy of Congress, in authorizing the taking of land and appurtenances, has been to limit the right to compensation to interests in the land taken. The only act called to our attention in which was conferred a right to compensation for injury to property other than an interest in the land taken is the statute involved in *United States* v. *Alexander*, 148 U. S. 186, which was passed more than forty years ago, and in which the injury provided for was a direct result of the taking. We need not consider other objections to a recovery.

Affirmed.